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No. 06-623

IN THE

Supreme Court of the United States

ARTHUR J. MISISCHIA, D.M.D.,

Petitioner,

v.

ST. JOHN'S MERCY HEALTH SYSTEMS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO A FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Association of American Physicians and Surgeons respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari submitted by Petitioner Arthur J. Misischia, D.M.D.

All Respondents refused to grant consent, without any explanation, thereby making this motion necessary.

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943, dedicated to defending the patient-physician relationship and free enterprise in medicine. AAPS has many members who fear misuse of peer review, known as "sham peer review," despite practicing good medicine. It also has members who have been victimized by misuse of the National Practitioner Data Bank ("Data Bank"), as occurred here. AAPS has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals.

Amicus AAPS has a direct and vital interest in the issues presented to this Court in order to preserve access to the courts when there is improper retaliation against physicians for speaking out in favor of patient care, and where there is misuse of the Data Bank.

Petitioner Dr. Misischia sought legal review of wrongful acts by Respondents relating to misuse of a peer review and the Data Bank. In an unprecedented ruling, the Eighth Circuit applied *res judicata* to an early state case in order to preclude Petitioner's second lawsuit, even though it was based on wrongful acts that occurred many years after the first case. This ruling frus-

trates the congressional intent underlying the governing statute, the Racketeer Influenced and Corrupt Organizations Act (RICO), and has dire consequences for legal remedies for misuse of the Data Bank.

Petitioner, and many others in similar situations, could not have reasonably anticipated the misconduct by Respondents that occurred here when he filed a state court action upon which the lower court based *res judicata*. Unless reversed, this ruling in the context of misuse of peer review will have a substantial harmful effect on the ability and willingness of physicians to speak out in favor of patient care.

This case has national implications for the delivery of quality medical care. Patients suffer when physicians fear retaliation for speaking out against substandard medical care. When adequate legal recourse is foreclosed to such physicians, as occurred here, the chilling effect is even greater. Few physicians will speak out for patients if it means risking their careers.

For the above reasons, AAPS respectfully requests that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Separate Accrual Rule adopted by a majority of the circuit courts is the proper standard for determining when a civil RICO claim accrues and how the four-year statute of limitations is applied.

2. Whether a civil RICO Complaint which alleges predicate acts of racketeering occurring within four years prior to the filing of the lawsuit and causing injury to Petitioner states a claim for which relief may be granted, regardless of the fact that some earlier predicate acts committed more than four years prior to filing the RICO action could have been raised in a prior lawsuit.

3. Whether this Court's ruling in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) permits the dismissal of a civil RICO case where the Complaint alleges predicate acts that amount to or threaten the likelihood of continued criminal activity and new injuries occurring within the limitations period even if some earlier predicate acts could have been raised in a prior lawsuit.

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Physicians and Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943. AAPS has many members who fear misuse of peer review, known as "sham peer review," despite practicing good medicine. It also has members

[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

who have been victimized by misuse of the National Practitioner Data Bank, as occurred here. AAPS is dedicated to defending the practice of private and ethical medicine so that physicians may speak out in favor of patient care without fear of retaliation. It has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals.

Amicus AAPS has a direct and vital interest in the issues presented here in order to preserve access to the courts when there is improper retaliation against physicians for speaking out in favor of patient care, and where there is misuse of the National Practitioner Data Bank.

SUMMARY OF ARGUMENT

Petitioner was the victim of what is known as "sham peer review." Sham peer review is manipulation of peer review to eliminate a physician from a hospital's staff for improper reasons, such as silencing a critic of substandard medical care. In 1994, Petitioner perceived the performance of unnecessary surgeries and fraudulent billing at Respondent St. John's Mercy Health Systems (the "Hospital"), and spoke out against these improprieties and Respondents for allegedly perpetrating them. As Petitioner alleged below, Respondents reacted by retaliating against Petitioner, suspending his privileges to practice at the Hospital. Petitioner promptly sued in state court, and prevailed against Respondent Dr. John J. Delfino, who was in charge of the relevant department at the Hospital.

But the wrongful acts did not end in 1994. Rather, Petitioner sets forth detailed allegations of additional wrongful acts by the Hospital and others that continued into 2004. For example, the Hospital persisted with a defamatory entry about Petitioner in the National Practitioner Data Bank ("Data Bank") until 2003. In 2001, the Hospital demanded that Petitioner not testify at a malpractice trial as a condition of correcting its defamatory entry about him in the Data Bank. This

improper retaliatory use of the Data Bank many years after the 1994 litigation could not have been reasonably anticipated by Petitioner. Petitioner filed a new complaint under the Racketeer Influenced and Corrupt Organizations Act (RICO).

The Eighth Circuit erred in affirming the dismissal of Petitioner's Complaint. It held that Petitioner was precluded from asserting a RICO cause of action for wrongful acts continuing until 2004 because of his failure to assert that claim in his 1994 lawsuit. Unless reversed, this unprecedented ruling in the context of sham peer review will have a substantial harmful effect on the ability and willingness of physicians to speak out in favor of patient care.

The Eighth Circuit misapplied the ruling of this Court in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), and implicitly required plaintiffs, under penalty of preclusion, to include RICO claims about *future* wrongful acts. This ruling, if not overturned, will encourage numerous physicians to include RICO claims in otherwise simple complaints about sham peer review, lest they be precluded from suing if harmed by wrongful acts in the future.

ARGUMENT

I. PRECLUDING COMPLAINTS ABOUT WRONGFUL ACTS RELATING TO "SHAM PEER REVIEW" HARMS THE NATIONAL INTEREST IN MEDICAL CARE

The decision below requires physicians who speak out for patient care, and who are then victimized by sham peer review, to plead all potential future misuses of the Data Bank or else lose access to the courts based on *res judicata*. For starters, such precedent could have dire effects on law enforcement if applied to criminal actions under the Racketeer Influenced and Corrupt Organizations Act (RICO). *See* 18 USCS 1961-1968. Moreover, this narrowing of the application of

RICO is contrary to the broad intent of Congress in passing the law. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 (1985) (emphasizing RICO's "self-consciously expansive language and overall [broad] approach").

But the primary concern of *Amicus* here is the deleterious effect of the ruling below in compelling plaintiffs to anticipate future wrongful acts and plead them in peer review litigation. This ruling will only encourage more misuse of the Data Bank. The Petition for Writ of Certiorari should be granted to restore access to the courts by those subjected to the wrongful acts of retaliation in the context of patient care at hospitals.

A. The Ruling Below Exacerbates a National Epidemic of Misuse of Hospital Review Procedures Known as "Sham Peer Review."

The misuse of peer review at hospitals, widely known as "sham peer review," is a national epidemic. *See, e.g.*, Gail Weiss, "Is Peer Review Worth Saving?", Medical Economics (Feb. 18, 2005);[2] John Zicconi, "Due Process or Professional Assassination?", Unique Opportunities (March/April 2001);[3] William Parmley, "Clinical Peer Review or Competitive Hatchet Job," 36 Journal of the American College of Cardiology 2347 (2000); David Townsend, "Hospital peer review is a kangaroo court," Medical Economics 133 (Feb. 7, 2000).

What appears to be "peer review" under the pretext of protecting patients is increasingly a "sham". *See, e.g.*, William Summers, "Sham Peer Review: A Psychiatrist's Experience and Analysis," *Journal of American Physicians and Surgeons* 125 (Winter 2005); Roland Chalifoux, Jr., M.D.,

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[2] http://www.memag.com/memag/article/articleDetail.jsp?id=147405 (viewed 1/5/07).

[3] http://www.uoworks.com/pdfs/feats/PEERREVIEW.pdf (viewed 1/5/07).

"So What Is a Sham Peer Review?" 7 *Medscape General Medicine* (No. 4) 47 (2005); John Minarcik, M.D., "Sham Peer Review: a Pathology Report," *Journal of American Physicians and Surgeons* 121 (Winter 2004); Lawrence Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," *Journal of American Physicians and Surgeons* 68 (Fall 2004).

The incentive for misusing this peer review power is even greater when a hospital and its favored physicians are presented with a physician like Petitioner who is willing to expose their malpractice in a legal proceeding. Physicians and hospitals are motivated by money just like everyone else, and they can be expected to hurt physicians who might expose their negligence or cause a reduction in their income. *See, e.g.*, Jeff Chu, "Doctors Who Hurt Doctors," Time 52 (Aug. 15, 2005) ("Th[e] system is too open to manipulation and needs reform, says the 4,000-member American Association [sic] of Physicians and Surgeons."). If a similar type of peer review were available to retail stores, then it would be in the self-interest of a struggling K-Mart to try "sham peer review" to end the competition from Wal-Mart. Such misuse would not be allowed in the retail context, yet it is rampant in the medical context.

The Petition illustrates what happens to physicians who speak out against unnecessary surgeries and fraudulent billings at hospitals. Petitioner Dr. Misischia's "reward" for doing the right thing was suspension of his medical privileges at the hospital and a ten-year ordeal in trying to clear his name. On a motion to dismiss, these allegations of the wrongful acts and their adverse effects must be taken to be true. *See H.J., Inc.*, 492 U.S. at 249. The denial below of full legal recourse to Dr. Misischia for speaking out in favor of patient care sends a powerful message to every other physician: keep quiet about wrongful surgeries, or else risk losing your career.

If a physician were truly a danger to patients, then the state medical board can and will restrict or revoke his license to practice medicine. Patients themselves will abandon such a

physician, just as shoppers will not continue buying bad products. But "sham peer review" does not attack bad physicians. Instead, as here, the misuse of peer review and the Data Bank is to silence good physicians who stand up against wrongful surgeries. Only a few courts have begun to apply meaningful scrutiny to the abuses. *See, e.g., Poliner v. Tex. Health Sys.*, 2006 U.S. Dist. LEXIS 74569 (N.D. Tex. Oct. 13, 2006); *Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663 (2006) (en banc).

Foreclosing judicial access by physicians who suffer retaliation for standing up for patients is precisely the opposite of what our nation's medical system needs at this time. A grant of this Petition for Writ of Certiorari is needed to stop the epidemic of sham peer review. *See, e.g.*, Steve Twedt, "The Cost of Courage: How the Tables Turn on Doctors," *Pittsburgh Post-Gazette* A1 (Oct. 26, 2003).[4]

B. The Lower Courts' Application of *Res Judicata* to Preclude Claims for Unanticipated Misuse of the Data Bank Will Encourage More Misconduct.

As this case demonstrates, misuse of the Data Bank can go far beyond the ordinary imagination and can be impossible to anticipate. Only the most cynical critic of hospitals would have anticipated that in 2001 the Hospital would agree to correct an error in its entry about Petitioner in the Data Bank only if Petitioner agreed not to testify against the Hospital in a malpractice case. (Complaint ¶165). Lest that unreasonable position of the Hospital be doubted, it repeated its improper demand later in 2001. (*Id.* ¶168). By 2002 one would reasonably expect such misuse of the Data Bank to cease. But the Hospital made yet another demand by letter which, as Petitioner alleges, caused him new injuries. (*Id.* ¶¶176-77, 194). It is contrary to public policy to preclude assertion of such

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[4] http://www.post-gazette.com/pg/03299/234499.stm (viewed 1/5/07).

claims. *See, e.g., Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 480-81 (2001) (holding that the plaintiff-physician "could not have anticipated when he signed the release that he would have his staff privileges terminated for whistleblowing that did not occur until 1991. We also conclude that to preclude [the physician] from raising his claims on whistleblowing activity would violate public policy. Hence, the release does not bar his claims.").

Such wrongful conduct fits hand-in-glove with the conduct targeted by Congress with RICO, as reiterated by this Court in *Sedima*. There this Court emphasized that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises" and that legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." 473 U.S. at 499. Hospitals, which often enjoy profits greater than most industries, fall squarely within that description of capacity for criminal activity and corresponding undeserved need for immunity. *See, e.g.*, Phil Galewitz, "Despite All the Grumbling, Hospital Bottom Lines are Healthy," Palm Beach Post 1F (Dec. 21, 1997).

The application of *res judicata* below, to preclude claims for wrongful acts committed many years in the future, implicates and potentially offends due process also. *Cf. South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) ("In sum, if the Alabama Supreme Court's holding in this case rests on state-law claim or issue preclusion (res judicata or collateral estoppel), that holding is inconsistent with [*Richards v. Jefferson County*, 517 U.S. 793 (1996)] and with the Fourteenth Amendment's due process guarantee."). In *South Cent. Bell Tel. Co.* the parties were not the same in the multiple proceedings, but even when the parties are the same due process is implicated when there is a denial of legal recourse based on new wrongful acts.

Petitioner alleged wrongful acts by Respondents within the four-year statute of limitations for RICO. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156

(1987). Rather than limiting and denying application of RICO, the national interest in quality care supports a robust and unfettered use of RICO here. *See Clark*, 117 Nev. at 475 ("Courts will not stand idly by if peer review board actions are arbitrary or capricious [or] contravene public policy.").

The ruling below is a victory for wrongful conduct in the context of peer review, and a defeat for quality patient care. The Petition for Writ of Certiorari should be granted to overturn this precedent.

II. BY REQUIRING PETITIONER TO HAVE ANTICIPATED FUTURE WRONGFUL ACTS IN A PRIOR PLEADING, THE DECISION BELOW MISAPPLIED *H.J. INC. V. NORTHWESTERN BELL TEL. CO.*

In dismissing the case below, the Eighth Circuit established a precedent that will encourage plaintiffs victimized by sham peer review cases to plead RICO claims simply to preserve them in the event there are future wrongful acts. This holding below misapplied this Court's teaching in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). As a result, the ruling below imposes an unnecessary and unhelpful complexity to the resolution of disputes over sham peer review.

As this Court emphasized in *H.J., Inc.*:

> Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

Id. at 242. It hardly makes sense to penalize a litigant, like Petitioner here, for pleading his action only after the "long-term criminal conduct" was clear.

The appellate court below stated that "Misischia's amended RICO complaint alleged ... acts [that] may or may not have been sufficient to state and prove a RICO violation" at the time of his prior lawsuit. *Misischia v. St. John's Mercy*

Health Systems, 457 F.3d 800, 805 (8th Cir. 2006). The court restated that "we had affirmed the dismissal of RICO claims based upon predicate acts occurring over a short period of time and threatening no future criminal conduct." *Id.* Petitioner properly waited for that longer "period of time" and clear threat of "future criminal conduct" before asserting his RICO claims here, and should not thereby be penalized with dismissal.

In reversing a prior dismissal of a RICO action by the same Eighth Circuit that ruled below, this Court emphasized that there should be dismissal of a RICO complaint only if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J., Inc.*, 492 U.S. at 249-50 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). The courts below erred in dismissing Petitioner's Complaint despite the possibility of proving actionable RICO violations consistent with it. A Writ of Certiorari is necessary to reverse this error and avoid its unfortunate consequences for our nation's medical system.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: January 5, 2007